NO. 83-1526

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALAN J. KARCHER, Speaker,
New Jersey Assembly, *et al.*,

Appellants,

vs.

GEORGE T. DAGGETT, *et al.*,

Appellees.

On Appeal From the United States District Court for the District of New Jersey

MOTION OF APPELLEES EDWIN B. FORSYTHE, *ET AL.* TO AFFIRM

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Questions Presented

1. Whether the present appeal from the three-judge District Court's unanimous exercise of its remedial discretion to adopt the proposed congressional redistricting plan the "Forsythe Plan" which achieved the greatest population equality of all of the plans in evidence before it, in compliance with the mandate of *Karcher* v. *Daggett*, is so unsubstantial as not to need further argument.

2. Whether appellants' failure to produce evidence in the District Court to demonstrate that any specific state policy bore a causal relationship to the nearly-threefold increase in population inequality created by the "Senate Plan," and therefore "justified" the increased population deviation of that plan, renders their appeal from the three-judge District Court's unanimous finding that the increased deviation was not justified so unsubstantial as not to need further argument.

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MOTION OF APPELLEES EDWIN B. FORSYTHE,[1] *ET AL.* TO AFFIRM

[1] The Honorable Edwin B. Forsythe, M.C. died on March 29, 1984. This motion will continue to refer to appellees Forsythe, *et al.*, who now include only Congressman Matthew J. Rinaldo, Congresswoman Margaret S. Roukema, Congressman Christopher H. Smith and the other New Jersey citizens who were plaintiffs in the District Court with the exception of George Daggett. Mr. Daggett has represented himself throughout this action. Congressman James A. Courter is also separately represented.

Appellees Edwin B. Forsythe, *et al.* respectfully move this Court, pursuant to Rule 16.1(c), to affirm the unanimous judgment of the three-judge United States District Court for the District of New Jersey, which adopted the congressional redistricting plan with the greatest population equality of all the proposed plans in evidence, on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Constitutional Provision Involved

Article I, Section 2 of the Constitution of the United States is set forth at pages 2-3 of the Jurisdictional Statement. [hereinafter "J.S.——"]

Statement of the Case

Appellants - - - the Democrat Speaker of the Democrat-controlled New Jersey Assembly, the Democrat President of the Democrat-controlled New Jersey Senate, and seven of the nine Democrat incumbent Members of Congress from New Jersey - - - appeal from the unanimous opinion and judgment of the three-judge United States District Court for the District of New Jersey (Gibbons, C.J., Fisher, Chief D.J. and Brotman, D.J.). The District Court, in the exercise of its remedial discretion as a result of New Jersey's failure to enact a congressional redistricting statute to replace the law declared unconstitutional by this Court in *Karcher* v. *Daggett*, 462 U.S. ——, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983), adopted the proposed plan which created the smallest population deviation from precise mathematical equality of any of the proposed redistricting plans before it. (J.S. 1a-34a)

The early procedural history of this action is set forth in detail in Section I of this Court's opinion in *Karcher* v. *Daggett, supra,* 77 L.Ed.2d at 138-140. On June 22, 1983, this Court affirmed the judgment of the three-judge District Court that New Jersey P.L. 1982, c.1 was unconstitutional because it created congressional districts with a degree of population inequality which was not unavoidable despite "a good-faith effort to achieve precise mathematical equality" and for which justification had not been shown, in violation of Article I, Section 2 of the Constitution.

After the filing of this Court's mandate, the District Court filed an Order on Mandate on December 19, 1983. (J.S. 31a) The Order formally declared P.L. 1982, c.1 unconstitutional, enjoined the state defendants from conducting any elections under P.L. 1982, c.1, and granted the New Jersey Legislature and Governor until February 3, 1984 "to enact a new constitutional plan for reapportionment." The District Court further directed in a letter to counsel that all parties submit no later than February 3, 1984 any redistricting plans which they desired the District Court to consider in the event that the Legislature and Governor failed to enact a new constitutional plan by February 3rd. Finally, the Court's December 19, 1983 Order set the matter down for further proceedings on February 7, 1984 if the state had not met the February 3rd deadline.

New Jersey failed to enact any new plan by February 3, 1984, and indeed has enacted no plan to this day. Although the Democrat-dominated Assembly and Senate passed a purportedly "new" plan (known variously as the "Brown-Lynch Plan" and the "Senate Plan"), that bill was vetoed by the Governor because it retained both unjustified population inequality and the gross gerryman-

dering of P.L. 1982, c.1. The Legislature made no attempt to override the veto.

Accordingly, the three-judge District Court convened a hearing on February 7, 1984 to choose a remedy for the constitutional violation left uncorrected by the failure of the New Jersey legislative process. At the hearing, all parties agreed that the Court should select a redistricting plan from among the proposed plans placed in evidence.

The District Court considered a number of redistricting proposals introduced in evidence by various parties and others. On February 17, 1984, the Court filed an opinion unanimously adopting the plan proposed by the Forsythe appellees ("the Forsythe Plan") because it was the plan which achieved the greatest population equality of all of the plans admitted into evidence at the hearing. (J.S. 12a) The Court noted that in contrast to the "Senate Plan" propounded by appellants, the Forsythe Plan created districts which were significantly more compact than those which would result from any of the other plans. In addition, the Court observed that the Forsythe Plan preserved minority voting power and noted the absence of any evidence from which it could find that the Forsythe Plan was "designed to achieve partisan advantage." (*Id.*) The Court made the unanimous finding of fact that the Democrats' Senate Plan, by contrast, was designed "to deviate from the norm of population equality for the patently discernable purpose of partisan advantage." (J.S. 8a-9a).

Appellants filed a Notice of Appeal from the District Court's judgment, and moved in this Court for a "stay" of that judgment pending appeal and for an expedited appellate schedule. In fact, the "stay" application was actually a motion for an injunction summarily reversing the District Court and requiring the implementation of

the Senate Plan instead of the Forsythe Plan. This Court denied that application on March 30, 1984, and denied the motion to expedite the appellate schedule on April 2, 1984. *Karcher* v. *Daggett*, No. A-740 (83-1526), Mar. 30 and April 2, 1984.

ARGUMENT

I. The three-judge District Court unanimously adopted the Forsythe Plan—the plan with the greatest population equality of all of the proposed plans before the Court—in the sound exercise of its remedial discretion under *Karcher* v. *Daggett*.

In *Karcher* v. *Daggett, supra*, this Court reaffirmed the primacy of precise population equality in the constitutional analysis of congressional redistricting plans under Article I, Section 2:

> We thus reaffirm that there are no de minimis population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification.

Karcher v. *Daggett, supra*, 77 L.Ed.2d at 143. The Court's opinion reiterated the two-part test of *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), to govern the analysis of congressional redistricting statutes:

> Thus two basic questions shape litigation over population deviations in state legislation apportioning congressional districts. ***First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population.*** Parties challenging apportion-

> ment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. *If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.*

77 L.Ed.2d at 140-141 (emphasis added; citations and footnote omitted).

A. The Forsythe Plan was the only plan before the District Court which achieved precise mathematical equality as nearly as was practicable.

Application of the *Karcher* test to appellants' "Senate Plan," as compared with the Forsythe Plan, reveals that the very existence of the Forsythe Plan was sufficient to carry appellees' burden under the first prong of the *Karcher* test. Since the maximum population variation of the Senate Plan was 67 people, while the maximum variation of the Forsythe Plan adopted by the District Court was only 25 people, there can be no question that the population differences created by the Senate Plan "could have been reduced . . . by a good faith effort to draw districts of equal population." 77 L.Ed.2d at 141. The Court's opinion in *Karcher* established firmly that "there are *no* de minimis population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification," 77 L.Ed.2d at 143 (emphasis added), and therefore the District Court's consideration of the relative merits of the two plans properly shifted to the second *Karcher* inquiry— whether the Sen-

ate Plan's proponents had sustained their burden of proving that this 168% increase in population inequality "was necessary to achieve some legitimate goal." 77 L.Ed.2d at 141.

B. Appellants failed to sustain their burden of specifically justifying the Senate Plan's deviation.

The only policy which appellants have ever claimed that the Senate Plan effectuates more completely than the Forsythe Plan - - - other than a policy favoring the election of Democrats over Republicans - - - is the alleged state policy against dividing municipalities between congressional districts. It should be noted that appellants never proved that such a state policy exists, other than noting that the unconstitutional P.L. 1982, c.1 divided no municipalities. Nevertheless, they urged the District Court to adopt the Senate Plan because it split no municipalities, while the Forsythe Plan achieved superior population equality but divided two of New Jersey's 567 municipalities.

This Court cautioned in *Karcher,* however, that "general assertions" of state interests which purportedly justify population deviations are insufficient:

> The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions.

77 L.Ed.2d at 147. As in *Karcher,* where both the District Court and this Court rejected the purported justification of preserving minority voting power in the Tenth District because appellants had demonstrated no causal relationship between the specific deviations in other dis-

tricts and that asserted goal, the record is barren of such a specific showing here.

Under the proposed Senate Plan, the smallest districts would be the Tenth (-52 from the ideal) and the Third (-11). The largest districts would be the Ninth (+15), the First (+12) and the Fifth (+12). *Compare* 77 L.Ed.2d at 149. Appellants have made no showing that the Senate Plan's refusal to split municipalities created these specific population deviations.

On the contrary, even when appellants abandoned this claimed important state policy by submitting their "Plan B," which was the Senate Plan changed only by the division of Kearny between the Tenth and Eleventh Districts, they still were unable to match the level of population equality achieved by the Forsythe Plan. This fact alone establishes that the inferiority of the Senate Plan, under the paramount criterion of precise population equality, was not the inevitable result of adherence to a claimed state policy of preserving municipal boundaries. Moreover, this Court specifically held in *Karcher* that "[p]reserving political subdivisions intact, however, while perfectly permissible as a secondary goal, is not a sufficient excuse for failing to achieve population equality without the specific showing" required by the second prong of the *Karcher* test. 77 L.Ed.2d at 142, n.5; *see* 77 L.Ed.2d at 147-149.

C. The District Court properly exercised its broad remedial discretion under *Karcher* v. *Daggett* and *White* v. *Weiser*.

The foregoing analysis demonstrates that, even had the Senate Plan been enacted by the Legislature and Governor, it would have failed both parts of the *Karcher*

test when compared with the superior population equality available under the Forsythe Plan. As the District Court pointed out, however, it was not necessary for it to consider at this remedy stage "how [the Senate Plan] would have fared had it been validly enacted by the State of New Jersey." (J.S. 7a; citations omitted) The District Court recognized, however, that *Karcher* does "provid[e] useful instruction to district courts faced, as we are, with selecting a districting plan because of a failure in the legislative process" and took into account the factors recognized as legitimate by this Court in *Karcher*: "making districts compact, preserving municipal boundaries, preserving cores of prior districts, avoiding contests between incumbents, and inhibiting gerrymandering." (J.S. 6a)

The Court continued:

> [The Senate Plan] is proposed to us as a remedy. As such it does not meet the criteria which we consider relevant to the exercise of our discretion in devising a remedy. First, it does not achieve as small an overall or mean deviation as other plans which are in evidence. While it does succeed in preserving municipal boundaries, the population variances it would maintain are not maintained for that purpose, but rather for the purpose of preserving, as nearly as possible, the districts erected in the Feldman Plan [P.L. 1982, c.1]. . . . The most glaring defects in the Feldman Plan, however, are carried forward in [the Senate Plan].
>
> These are an obvious absence of compactness, and an intentional gerrymander in favor of certain Democratic representatives.

(J.S. 7a-8a)

As they did in the District Court, appellants claim in this Court that *White* v. *Weiser*, 412 U.S. 783 (1973), required the adoption of the Senate Plan. Appellants misperceive *Weiser* both on the law and the facts.

Justice Stevens noted in his opinion concurring in this Court's denial of appellants' stay application that "[o]nce a constitutional violation has been found, a District Court has broad discretion to fashion an appropriate remedy. *E.g.*, *Milliken* v. *Bradley*, 433 U.S. 267, 280-288 (1977)." *Karcher* v. *Daggett*, No. A-740 (83-1526), Mar. 30, 1983 (concurring opinion of Stevens, J.). *Weiser* does not purport to limit the *necessary* exercise of that discretion, but prohibits divergence from expressed state policy only where such federal intervention is not necessary to vindicate a paramount federal constitutional principle:

> Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, *whenever adherence to state policy does not detract from the requirements of the Federal Constitution*, we hold that a district court should *similarly* honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor "intrude upon state policy any more than necessary." Whitcomb v. Chavis, supra, [403 U.S. 124,] at 160.

White v. *Weiser*, *supra*, 412 U.S. at 795. (emphasis added)

In *Weiser*, the District Court ordered adoption of a redistricting plan which *neither* adhered to the state's

redistricting policies *nor* achieved the maximum practicable population equality, and this Court reversed:

> Plan B, as all parties concede, represented an attempt to adhere to the districting preferences of the state legislature while eliminating population variances. *Indeed, Plan B achieved the goal of population equality to a greater extent than did Plan C.* Despite the existence of Plan B, the District Court ordered implementation of Plan C . . . .

412 U.S. at 796. (emphasis added) This Court has never held, however, that the supreme federal constitutional criterion of precise mathematical equality, as nearly as is practicable, is to be sacrificed in favor of deference to state political considerations. *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964); *Kirkpatrick* v. *Preisler, supra*, 394 U.S. 526, 530-531 (1969). Yet that is the result appellants urge here.

This Court has reaffirmed in this very case that *no* increase in population equality among congressional districts is so small that it is to be disregarded or sacrificed on the altar of state political expediency. Justice Brennan spoke eloquently for the Court: "As between two standards— equality or something-less-than equality—only the former reflects the aspirations of Art. I, § 2." *Karcher* v. *Daggett, supra*, 77 L.Ed.2d at 142.[2]

In summary, this Court specifically held in *Weiser* that "the District Court should defer to state policy in fashioning relief only where that policy is consistent with con-

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[2] Because the plan adopted by the District Court achieves greater population equality than any other plan before that Court, this Court need not accept appellants' invitation to decide the issue of gerrymandering in order to affirm the District Court.

stitutional norms and is not itself vulnerable to legal challenge." 412 U.S. at 797; *see* J.S. 8a. Appellants have failed to demonstrate that any particular state policy or policies caused the Senate Plan's higher deviation and therefore have failed to justify that deviation under *Karcher*. The District Court was well within its remedial power in adopting the plan which achieved the higest degree of population equality of all the proposals before it.

Accordingly, the judgment of the District Court presents no substantial constitutional issues requiring further briefing and argument, and therefore should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the District of New Jersey should be affirmed.

Respectfully submitted,

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